

Protest of	)	Date: November 27, 1990
	)	
NESCO DESIGN GROUP	)	
	)	
Solicitation No. 104230-90-A-0113	)	P.S. Protest No. 90-53

### DECISION

Nesco Design Group (Nesco) has protested award of a contract for quality assurance services under Solicitation No. 104230-90-A-0113 to Intertek Services Corp. (Intertek). Nesco claims that its technical proposal was incorrectly evaluated and that Intertek's use of independent contractors was impermissible under the terms of the solicitation as well as federal tax regulations.

Solicitation No. 104230-90-A-0113 was issued by the Office of Procurement, Headquarters on May 22, 1990, with an offer due date as amended, of June 29. Several offers were received. Intertek's offer had the highest evaluated technical score (75.33) while Nesco ranked fourth at 52.1. Intertek's offer was also deemed to be much less risky than that of Nesco. Award was made to Intertek and this protest followed after Nesco was debriefed by the contracting officer.

Nesco asserts that the Postal Service's "evaluation methods and final analysis" of its proposal were flawed and not in accordance with the requirements of the solicitation and that its proposal met and surpassed all solicitation requirements. It claims that the deficiencies disclosed in its debriefing were incorrect and merely illustrate the overly general manner in which its proposal was evaluated.

Nesco also asserts that Intertek's use of independent contractors to perform this contract is precluded by the "federal tax treatment" of quality assurance representatives. It attaches its counsel's opinion which supports this position.<sup>1/</sup> Therefore, it asserts that the contract award was invalid and must be reversed.

In his report, the contracting officer states that Nesco's unspecific allegations lack validity. He declares that Nesco was under a duty to address every solicitation requirement and that the evaluation committee considered Nesco's proposal in accor

<sup>1/</sup>The firm's conclusion was as follows:

it is our firm opinion that Nesco was precluded by Section 503(d) [of the Revenue Act of 1978] from submitting any bid to the USPS premised upon the federal tax treatment of the QAR staff as independent contractors, for two independent reasons:First, the USPS specifications require a level of Contractor accountability which precludes the Contractor from maintaining the hands-off relationship with the QAR staff required to treat staff members as independent contractors. Second, independent of the terms of the USPS Solicitation, the individuals in the labor force who are qualified to be retained as a QAR do not, as a practical reality hold themselves out as independent contractors, but work exclusively as employees.

dance with the evaluation criteria set forth in the solicitation. The contracting officer concludes that Nesco's allegation that it was incorrectly evaluated are unsubstantiated.

As to the issue that Intertek's use of independent contractors violates the solicitation provisions, the contracting officer states that this allegation is untimely if it is deemed to allege any deficiency apparent on the face of the solicitation and also irrelevant. He notes that the solicitation did not specify the relationship between the offeror and its proposed personnel because that would be restrictive of competition and would interfere with the internal operation of the offerors.<sup>1/</sup>

Intertek has submitted comments on the protest. It alleges that the protest is untimely, because Nesco's assertion that the solicitation prohibited the use of independent contractors was apparent on the face of the solicitation and, therefore, that part of Nesco's protest is untimely pursuant to PM 4.5.4.a.<sup>2/</sup> Intertek also claims that Nesco lacks standing as an interested party to protest pursuant to PM 4.5.2.a. because it does not have a direct economic interest in the result of a protest such that it would be in line for award if the protest were sustained. Since Nesco ranked fourth among the offerors and has not called into question any aspects of the proposals of the intervening offerors, Intertek claims Nesco lacks standing as an interested party.

As to the merits of Nesco's claims, Intertek claims that, unless a solicitation specifically restricts the use of subcontractors, there is no prohibition on the Postal Service's right to accept a proposal which is based on significant use of subcontractors. Indeed, it notes that limitations on subcontracting can be restrictive of competition and that subcontracting is a normal and usual part of government contracting. It claims that Nesco's assertion that the solicitation required that the quality assurance services be provided by an offeror's employees is totally unsupported in the solicitation, which, at several points indicated that subcontracting would be allowed.<sup>3/</sup>

<sup>2/</sup>The protest file also contains statements from the General Manager, Quality Assurance Division, (who, apparently, was the chair of the evaluation committee), that Nesco's proposal was evaluated in accordance with the solicitation requirements, that the quality assurance requirements of this solicitation are substantially more extensive than that of the contract on which Nesco is presently providing services, that Nesco's resumes did not establish the qualifications of its employees as well as Intertek's, and that the evaluators could only evaluate the offerors on what was contained in their proposal and were required to exclude their personal knowledge of incumbent's work to avoid improper bias in the evaluation.

<sup>3/</sup>In passing, Intertek argues that Nesco's protest of the evaluation of its proposal is invalid because it is too general and unspecific. We disagree. As initially set forth, and as explicated in its additional comments, Nesco has alleged this ground of its protest in sufficiently specific terms to meet the requirements of PM 4.5.3.a. See International Mailing Systems, P.S. Protest No. 84-13, April 27, 1984.

<sup>4/</sup>Specifically, Section J.10.a.2 and the proposal instructions indicated that proposals must include all information concerning the offeror's proposed use of subcontractors. In addition, Amendment 01 to the solicitation contained the following language:

23. Question: Is it essential [that] these people be our employees vs. independent contractors? Why?

Nesco has responded to the contracting officer's statement and Intertek's comments. It states that it has been the incumbent contractor for these services for the past three years and that the employees on which it based its proposal were satisfactorily working on its contract. It cannot comprehend how its experienced employees were rated technically lower than Intertek's, especially because Intertek has, prior to contract performance, attempted to hire Nesco's employees away from it to work on this contract. Nesco concludes that the only possible explanation for this action is that its employees were more experienced and capable than Intertek's and that the contracting officer misevaluated the proposals.

Nesco further claims that Intertek stated in its proposal that it would not require subcontractors to perform the contract, in contradiction to its attempts to hire Nesco's employees as independent contractors. Nesco restates its contention that Intertek's alleged use of independent contractors to perform the contract requirements is in violation of federal income tax requirements and is not a procedure which should be approved of by the Postal Service. Nesco claims that Intertek is attempting to treat its workers as both employees for purposes of compliance with its contractual requirements and as independent contractors for its tax purposes, which is unfair.

Nesco also states that its protest was timely filed, as it was not based on deficiencies in the solicitation, but rather was apparent only after contract award to Intertek and the debriefing concerning the evaluation of its proposal. Nesco also claims that it is an interested party pursuant to PM 4.5.2, given the nature of the issues raised and the relief it seeks, even though it is not next in line to receive award. Nesco cited York International Corporation, P.S. Protest No. 89-77, January 19, 1990, and Air Transport Association of America, P.S. Protest No. 90-02, March 23, 1990 to support this legal theory.

The issue of whether Nesco's proposal was properly evaluated has been timely raised by an interested party under our regulations. However, our review of the evaluation of an offeror's proposal in a negotiated procurement is limited:

[T]his office will not substitute its judgment for that of the evaluators or disturb the evaluation unless it is shown to be arbitrary or in violation of procurement regulation. H & B Telephone Systems, [P.S. Protest No. 83-61, February 6, 1984]; Amdahl Corporation, P.S. Protest No. 81-34, September 29, 1981. The determination of the relative merits of technical proposals is the responsibility of the contracting officer. This office does not resolve disputes on the scoring of technical proposals. Computer Systems & Resources, Inc., [P.S. Protest No. 86-4, March 27, 1986], citing, Mid-Atlantic Forestry Services, Inc. Comp. Gen. Dec. B-217334, September 9, 1985, 85-2 CPD & 279. Huntington Laboratories, Inc., P.S. Protest No. 89-46, November 15, 1989, quoting Management Concepts, Inc., P.S. Protest No. 86-29, July 10, 1986.

Answer:

What is essential is that the USPS have a single point of contact to deal administratively with the QAR's.

Nesco's assumes that, since it has provided adequate quality assurance services for the Postal Service in the past and Intertek has indicated its desire to hire its employees, the only conclusion which can be reached is that the contracting officer misevaluated its proposal. This is not so.

We have reviewed the protest file and find that Nesco and Intertek were evaluated on the basis of their submitted proposals, in accordance with the requirements of the solicitation. There is no evidence of record which indicates any impropriety in the evaluation and award process. Nesco's allegations that its tenure as incumbent was successful and Intertek wants to hire its employees to work on the new contract fail to establish any impropriety; rather, they are pieces of circumstantial evidence which do not suffice to carry Nesco's burden of proof that the evaluation process at issue was fatally flawed. We deny this ground of the protest.

As to Nesco's argument concerning Intertek's allegedly improper employment of independent contractors to perform the contract requirements, Nesco lacks standing. Our general rule for determining whether a protester is an interested party is whether the protester would be eligible to receive contract award if its protest were upheld. Canteen Service, Inc., P.S. Protest No. 90-68, November 15, 1990; Compu-Copy, P.S. Protest No. 90-21, July 5, 1990; Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985. It is undisputed that Nesco only ranked fourth in the proposal evaluation. Since it failed to allege any inadequacies in the proposals of the intervening offerors, it lacks standing to protest any alleged inadequacies in the evaluation of Intertek's proposal.

The cases cited by Nesco to support its claim of standing on this issue are distinguishable. In York International Corporation, a potential supplier was deemed to have standing as a limited exception to the general rule because no immediate party had a greater interest in the issue raised and there was a possibility that recognizable interests would be inadequately protected were access to our protest forum limited to potential awardees. Air Transport Association was to the same effect, except that the protester was an association of potential suppliers, rather than a particular potential supplier. These cases have no relevance to the present case, where the second and third evaluated offerors have a greater interest than Nesco in having these issues raised and were closer to being potential awardees if there had been some impropriety in the evaluation and award of Intertek's proposal than Nesco. We find that this issue must be dismissed because Nesco lacks standing to raise it.<sup>4/</sup>

<sup>5/</sup>We note that, as a general matter, we do not resolve issues regarding the federal tax implications of an offeror's proposal. If an offeror is in compliance with the terms and conditions of its contract with the Postal Service, how it chooses to structure its internal affairs, for tax purposes or otherwise, is a matter not properly before our office.

We also note that the solicitation contained no prohibition on the use of subcontractors to perform the necessary services, as long as the other terms and conditions of the contract were fulfilled.

The protest is dismissed in part and denied in part.

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[checked against original JLS 6/22/93]**